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In The

Supreme Court of the United States

October Term 1994

DR. MICHAEL G. FORRESTER; MICHAELENE ANN JENKINS; DONNA E. NIEHOUSE; DENA A. NIEHOUSE; NANCY H. SCOFIELD; HAROLD E. SCOFIELD,

Petitioners,

v.

CITY OF SAN DIEGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals was correct in finding that substantial evidence supports the jury verdict below that Respondent City of San Diego's police officers did not use excessive force in utilizing pain compliance techniques to arrest Petitioners.

2. Whether the Ninth Circuit Court of Appeals, given the jury verdict below, was correct in refusing to address the constitutionality of the City of San Diego's policy authorizing the pain compliance techniques utilized in arresting Petitioners.

PARTIES

Respondent agrees with Petitioners' list of Petitioners contained in the caption of the Petition For Writ of Certiorari. However, Respondent City of San Diego is the only Respondent remaining in this matter; Respondents Donald Fashing and D. Hannan listed in the caption were dismissed prior to the jury trial in the United States District Court for the Southern District of California.

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OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

Respondent agrees with Petitioners' statements regarding the opinions below, jurisdiction of this court, and the constitutional provision and statute involved in this case.

STATEMENT OF THE CASE

In the spring of 1989, the San Diego Police Department began to prepare for the impending arrival in San Diego of the national anti-abortion organization called Operation Rescue. The administration of the department had been made aware of Operation Rescue's protest tactics through intelligence sources, the media and contact with other departments, and was advised in March of 1989 that Operation Rescue was planning a protest at a facility in San Diego on April 8, 1989.

In response to that information, Respondent's Chief of Police Robert Burgreen held a meeting with his top staff in order to formulate and develop a contingency plan to deal with the upcoming protest. The Chief and his staff considered and discussed the options available to the police to deal with the tactics employed by Operation Rescue, and narrowed those options down to three possibilities. The first option – to do nothing at all – was eliminated as an abrogation of the law enforcement duties of the police. The second option – to drag and carry the demonstrators away from the premises upon which they trespassed – was also eliminated since it

created a great risk of injury to the police and to the protestors. The third option – utilizing pain compliance techniques to remove the protestors – was finally adopted as the "least bad option" of the three available.

Following the Chief's staff meetings, the San Diego Police Department adopted an official policy that any protestor who was arrested and didn't voluntarily walk away from the premises upon which he or she was trespassing when asked to do so by the police would be forcibly removed by the use of Orcutt Police Nunchakus (OPNs) and/or some other pain compliance method. In addition, the policy prohibited officers from dragging or carrying any arrestees who refused to voluntarily walk away from the premises.

Contrary to Petitioners' repetitive contentions, the policy did not mandate the use of pain compliance techniques on every protestor. The use of pain compliance was a force option available to the arresting officers, and was to be used only if necessary and as necessary. The protestors were to be given every opportunity to avoid arrest altogether, but if they refused that alternative, they were to be arrested. Once arrested, the protestors were to again be given every opportunity to voluntarily leave the premises, and were to be removed via pain compliance techniques only if they refused to do so. If pain compliance techniques were to be used to effect the arrestee's removal, the officers were instructed to use only that amount of force necessary to gain compliance and to decrease or desist the use of force once compliance was obtained. The amount of force to be used was directly related to the amount of cooperation or resistance from

the arrestee and, in effect, was dictated by the arrestee's own actions or inactions.

On April 8, 1989, Operation Rescue did, indeed, stage a demonstration at a medical clinic in the City of San Diego. During that demonstration, five of the Petitioners in this case and one hundred eleven other protestors were arrested and removed from the premises upon which they were trespassing. Subsequent demonstrations occurred at other medical facilities in the City of San Diego on April 29, 1989, and June 10, 1989, in which Petitioners Nancy Scofield and Harold Scofield, among scores of others, were arrested. All of the arrests of the Petitioners in this case were videotaped, and a master videotape was prepared for use during trial. A viewing of that videotape clearly shows that each Petitioner was repeatedly given the opportunity to avoid arrest, that those offers of leniency were refused or ignored, that each Petitioner was subsequently advised that he or she was under arrest, that each Petitioner was ordered to leave the premises upon which he or she was trespassing, that each Petitioner refused to do so, that pain compliance was then applied to each Petitioner, that the Petitioners were repeatedly begged by the officers to cooperate so that the infliction of pain could be eliminated, and that the amount of pain used upon each Petitioner was varied according to the resistance of the particular Petitioner, up to and including the use of no pain compliance at all. The manner in which the Petitioners were arrested, seized and removed from the premises on April 8, April 29, and June 10, 1989, was

pursuant to, and consistent with, the official pain compliance policy established prior to the demonstrations by the San Diego Police Department.

Following their arrests, Petitioners brought suit against Respondent, pursuant to 42 U.S.C. section 1983, alleging that their constitutional rights were violated by the use of excessive force during their arrests and that Respondent's pain-compliance policy caused those constitutional violations. Cross-motions for partial summary judgment were filed by Petitioners and Respondent concerning the constitutionality of the pain-compliance policy. The magistrate judge denied Petitioners' motion and granted that of Respondent, holding that the policy was not unconstitutional.

Prior to the commencement of trial, Respondent requested that the District Court give effect to its ruling on Respondent's summary judgment motion by limiting certain evidence during trial, dismissing Respondent City of San Diego, and giving a special limiting instruction to the jury concerning its ruling on the constitutionality of the pain compliance policy. The court denied all of Respondent's motions and requests, and the case proceeded to trial by jury.

Following trial, the jury was given a Special Verdict form in which it was asked to unanimously answer the following question:

> Was excessive or unreasonable force used by the City's police officers to complete the arrest of (Petitioner) on (date of arrest)?

The jury answered "no" on each of the eight contested arrests.

Judgment was, therefore, subsequently entered in favor of Respondent, and Petitioners pursued a timely appeal to the Ninth Circuit Court of Appeals, which affirmed the judgement below.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals was correct in finding that substantial evidence supports the jury verdict below that Respondent City of San Diego's police officers did not use excessive force in utilizing pain compliance techniques to arrest Petitioners. The appellate court correctly recognized that *Graham v. Connor*, 490 U.S. 386 (1989) governs the question of the reasonableness of the use of force by arresting police officers and appropriately applied the factors enunciated in *Graham* to the evidence contained in the record on appeal.

Furthermore, the Ninth Circuit Court of Appeals was also correct in declining to address the question of the constitutionality of Respondent's policy authorizing the use of pain compliance techniques to arrest Petitioners. The jury verdict that no excessive force was used during the arrests rendered moot the question of whether the policy authorized excessive force. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

The Ninth Circuit Court of Appeals did not create any lack of uniformity in existing law in deciding this case, but instead correctly and steadfastly applied that law. Furthermore, this case does not raise any questions of exceptional importance that merit review by this court.

For those reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

ARGUMENT

A. This Court's Opinion Did Not Create Any Lack Of Uniformity In The Law Governing The Use Of Force By Peace Officers

The Ninth Circuit Court of Appeals, in its opinion, held that sufficient evidence supported the jury verdict below that no excessive force was used in arresting Petitioners. Furthermore, given that holding, the Court declined to address and never reached the issue of the constitutionality of Respondent's use-of-force policy. Both of those conclusions are firmly based upon existing law and do not create any inconsistencies or uncertainties in Fourth Amendment law.

The Ninth Circuit first recognized that *Graham v. Connor*, 490 U.S. 386 (1989), governs the question of the reasonableness of Respondent's use of force in making the complained-of arrests, and then proceeded to systematically analyze the factors enunciated in *Graham*. The court did not deviate from those factors, ignore any of them or add to them. Each factor was addressed and supporting evidence was identified, and the inescapable conclusion was reached – that substantial evidence supports the jury verdict. The court did nothing that could be interpreted as disruptive of, or inconsistent with, this court's uniform approach to analyzing allegations of excessive force by peace officers.

In addition, the Ninth Circuit's next step of declining review of Respondent's use-of-force policy, given the jury verdict below, was also consistent with established precedent in this area. This court in *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), spoke precisely and succinctly on this point:

> If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulation might have authorized the use of constitutionally excessive force is quite beside the point.

Petitioners have offered no legal precedent to dispute the applicability of *Los Angeles v. Heller, supra,* to these facts and cannot realistically claim that the Ninth Circuit has somehow disrupted the uniformity of decision in this area by steadfastly following and applying the rule of that case.

Consideration of this case by this court is clearly not necessary. The Ninth Circuit Court of Appeals opinion does not deviate from precedence, nor does it create "new Law." The uniformity of decision in this area of Fourth Amendment law has not been disturbed by the decision below, and further review is simply unnecessary. For those reasons, it is respectfully requested that Petitioners' petition be denied.

B. This Case Does Not Raise Questions Of Exceptional Importance

This case admittedly involves an interesting factual situation, but it is one that is unique unto itself and not a matter of exceptional importance. Petitioners have not

offered any evidence or even speculation as to the impact this decision will have on society, government, police departments or civil demonstrators locally, statewide or nationally. In fact, it will have little impact. If force is necessary in policing future demonstrations, wherever they may be, the reasonableness of the use of force will be determined by police departments, juries and courts using the standards set forth in *Graham v. Connor, supra.* No new or different standards governing the use of force have been unveiled in this case. Furthermore, the constitutionality of use-of-force policies employed by police departments nationwide will continue to be analyzed in conjunction with an analysis of the individual officer's actual use of force on the street, as is required by *Los Angeles v. Heller, supra.* The opinion in this case has not changed that maxim of law. Although this case is indeed important to both Petitioners and Respondent, it simply does not present questions of such exceptional importance that review by this court is indicated or justified. For those reasons, it is respectfully requested that Petitioners' petition be denied.

C. Conclusion

The Ninth Circuit Court of Appeals did not overlook or misapprehend any points of law or fact in its opinion in this matter. Petitioners' arguments in that regard are simply restatements of issues and arguments that have been raised, considered and rebutted throughout the litigation and appeal of this case. The trial court, jury and appellate court may not have accepted Petitioners' arguments, but they have considered them and surely have

not overlooked or misapprehended them. Furthermore, The Ninth Circuit did not deviate from precedence or disrupt the uniformity of decision in this area of Fourth Amendment law, but simply applied existing law to the substantial evidence contained in the record on appeal. There is no lack of uniformity created by the opinion below. Finally, regardless of the unique factual situation and obvious personal importance to the litigants involved, this case simply does not raise questions of such exceptional importance that further review by this court is necessary. For all of those reasons, Respondent respectfully requests that Petitioners' Petition For Writ of Certiorari be denied.

Dated: January 11, 1995

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